UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN RE: AUTOMOTIVE PARTS ANTITRUST LITIGATION	Master File No. 12-md-02311 Honorable Marianne O. Battani
THIS RELATES TO: ALL ACTIONS	

DEFENDANTS' JOINT MEMORANDUM REGARDING THE MOTION TO STAY BY THE UNITED STATES OF AMERICA

Defendants, by their undersigned counsel, submit this joint memorandum regarding the Motion to Stay by the United States of America [ECF No. 556] (the "Motion to Stay"), pursuant to the Court's Orders of July 24, 2013 [ECF No. 565], August 23, 2013 [ECF No. 586], and September 3, 16 and 30, 2013 [ECF Nos. 588, 592 and 600].

I. INTRODUCTION

In its Motion to Stay, the United States Department of Justice ("DOJ") requests a temporary and limited stay of certain discovery that "goes to the merits" of the cases consolidated before this Court, and to "permanently prohibit discovery of any type, in any of the civil cases, that seeks to obtain information about the [DOJ]'s investigation or any grand jury investigation." Mot. to Stay at 9-10. Plaintiffs did not object to the DOJ's request, *see id.* at 2, except with respect to the proposed length of the stay on merits discovery, which they sought to revisit after six months, rather than the year that the DOJ proposed. *See* Transcript of July 10, 2013 Status Conference ("Stat. Conf. Tr.") at 25-32 [Ex. A]. Following the Status Conference, the Court ordered all parties to "work out" a possible resolution to Plaintiffs' objection to the

length of the proposed stay. *Id.* at 28-32.

Since that time, counsel for Direct Purchaser Plaintiffs, Automobile Dealer Plaintiffs, and End Payor Plaintiffs (collectively, "Plaintiffs"), Defendants, and the DOJ have conferred telephonically and exchanged multiple drafts of a proposed Order in an attempt to reach an agreement on the language for the Order, but have reached an impasse on several issues. Plaintiffs and Defendants are submitting a proposed Order for the Court's consideration that identifies proposed alternative language with respect to five issues: (A) the scope of the stay in general; (B) whether parties may withhold instead of deciding to redact documents that contain both information as to which discovery is stayed and other information until the Stay is over; (C) the scope of discovery in the "Later Cases"; (D) the Plaintiffs' ability, once the Stay is lifted, to take discovery with respect to the DOJ's investigation; and (E) the Plaintiffs' ability to take multiple depositions of witnesses who have knowledge of information subject to the Stay. A copy of the proposed Order showing the Parties' respective proposed alternative language is attached as Exhibit B, and a copy of the proposed Order showing only Defendants' proposed language is attached as Exhibit C.

Defendants understand that the DOJ supports that documents containing information subject to the Stay may be withheld rather than redacted. With respect to Plaintiffs' proposal regarding post-Stay discovery into the DOJ's investigation, Defendants understand that the DOJ adamantly opposes any formal discovery at any time from any party regarding the DOJ's investigation, including statements made by witnesses and entities to the DOJ (with a narrow exception, as reflected in Defendants' proposed Order, and discussed below). On the other issues, Defendants understand that the DOJ either believes the language proposed by either side

is acceptable, or takes no position. In this Memorandum, Defendants set forth their position regarding each of these five issues.

II. AREAS OF DISAGREEMENT

The DOJ's Motion and the Parties' proposed Order differentiate between the "Initial Cases" (involving Automotive Wire Harnesses, Instrument Panel Clusters, Fuel Senders, and Heater Control Panels) and the "Later Cases" (involving Bearings, Occupant Safety Systems, Alternators, Anti-Vibrational Rubber Parts, Windshield Wipers, Radiators, Starters, and all cases subsequently filed in or consolidated into MDL 2311). Defendants' position with respect to the issues in dispute is as follows:

A. Scope Of The Stay

The DOJ sought a Stay with respect to depositions in the Initial Cases and the Later Cases, and with respect to all discovery in the Later Cases, "that goes to the merits of those cases." DOJ Motion at 9-10. Plaintiffs objected to using the phrase "goes to the merits" in the Order, and the Parties and the DOJ have spent considerable effort attempting to reach agreement on terms describing the scope of discovery that is subject to the Stay (defined in the proposed Order as the "Stayed Subjects"). Defendants propose that the Stayed Subjects include "conduct that is or has been under investigation by the DOJ," which the DOJ has advised Defendants is acceptable to the DOJ. Plaintiffs would limit the Stay to "actual or potential criminal conduct under investigation by the DOJ." Defendants understand that that formulation is acceptable to the DOJ as well.

The DOJ sought to stay "merits depositions" in both the Initial Cases and Later Cases because "merits depositions at this point in time would likely compromise anticipated criminal

litigation." Mot. to Stay at 6. Rather than staying depositions on the "merits" of the civil cases, however, Plaintiffs' proposal would limit the scope of the Stay to questions concerning "actual or potential *criminal conduct*." (Emphasis added.) Thus, under Plaintiffs' formulation, the Stay could not be invoked to prevent testimony by witnesses who have information about the merits of the case unless the witness (or his counsel) effectively acknowledges that the testimony being elicited concerns conduct that was either actually or potentially criminal. Such witnesses would be placed in an impossible situation: either acknowledge potentially criminal behavior by themselves or another party in order to invoke the Stay, or testify in response to questions about the merits, thus undermining the purpose of the Stay and putting at risk the integrity of the DOJ's investigation. Neither outcome is sensible. At the request of the DOJ, Defendants have modified the language they are proposing to include the italicized words "is *or has been* under investigation by the DOJ." Defendants request that the Court accept the language proposed by Defendants.

B. Temporarily Withholding Versus Redacting Documents That Contain Some Information As To Which Discovery Is Stayed In The Initial Cases

In the Initial Cases, the agreed-upon terms of the Stay would prohibit parties from demanding any discovery relating to contacts among competitors concerning products *other than those at issue in the Initial Cases* or competitors *other than those named as Defendants in the Initial Cases*.

Plaintiffs' document requests will inevitably be broad enough to encompass documents that contain references to products or competitors other than those at issue or named as Defendants in the Initial Cases. Defendants have proposed that they be allowed to withhold such

documents from production until the Stay has expired, and Defendants have offered to provide a list of Bates numbers of withheld documents. Plaintiffs have rejected that proposal, and demand that Defendants either (1) produce in their entirety any documents responsive to a document request that include references to other products or competitors or (2) review all documents referencing other products or competitors, redact all such references, and provide detailed logs explaining the "specific reasons" for each redaction. Defendants understand that the DOJ supports Defendants' proposal.

There is no reason to impose on Defendants the enormous expense and effort that would be required to redact and log all such redactions, *especially* given that these documents ultimately will be produced once the Stay is lifted. In fact, because no depositions making use of any such documents can occur while the Stay is in place, withholding documents that fall within the scope of the Stay would have little, if any, impact on Plaintiffs.

Certain of the *Wire Harnesses* Defendants have already produced in the past year over 12 million pages of documents that were provided to the DOJ in response to grand jury subpoenas. The initial proposed Stay is only six months, after which any party may request it be lifted or modified. Pursuant to the DOJ's request, no deponent can be asked during the Stay about any Stayed Subjects, so Plaintiffs cannot use any of these documents in depositions until the Stay is over anyway. Plaintiffs' proposed process of redacting and logging would be extremely time-consuming and would present substantial logistical difficulties and the potential for confusion. Indeed, by the time Defendants would have completed it, the Stay may very well have expired, rendering all of that work a complete waste of time, effort and money. Imposing this extraordinary burden and expense on Defendants is unjustified, especially since Plaintiffs would

not be prejudiced if documents that include references to other products or competitors are temporarily withheld, and redacting and logging all such redactions would not provide them with anything of value.

In addition, Plaintiffs' proposal would create substantial logistical difficulties and confusion in an already highly-complex litigation. Redaction would result in two or more conflicting versions of every affected document. Many documents will exist in multiple copies located in the files of various departments and custodians. For each copy of any given document, Plaintiffs would require each Defendant to (i) make a judgment about what to redact, (ii) produce a redacted version of the document, and, once the Stay is lifted, (iii) presumably produce an *un-redacted* version of the same document. This would result in all the parties' databases containing multiple versions of the same documents, with each of the redacted versions having no value at all once the Stay is lifted.

Plaintiffs alternatively demand that, if the Court does allow Defendants to withhold documents (rather that redacting them), Defendants provide an extraordinarily detailed "withholding log," listing "at a minimum" the date of each document, its author, all recipients, each custodian, its "general subject matter," its Bates number, and the "specific reason[]" that the Defendant is withholding each document. Ex. B at 2-3. This demand is a recipe for avoidable burden and wasted expense. Providing a list of the Bates numbers of withheld documents during the Stay will suffice to assure Plaintiffs that all withheld documents have been produced post-Stay. The detailed information Plaintiffs demand serves no purpose whatsoever, unless Plaintiffs (or the Court) are interested in engaging in a document by document debate during the Stay of whether each document has properly been temporarily withheld, which

debate, of course, would be entirely moot once the Stay is lifted and the documents are produced. This situation is thus completely different from that where documents are being permanently withheld under a privilege claim, where a privilege log is necessary to ensure that a valid basis exists for withholding each such document.

All of this burden, waste, logistical difficulty, and potential for error can be avoided by allowing Defendants, during the period of the Stay, to withhold from production documents that include references to products or competitors other than those involved in the Initial Cases, and provide a list of the Bates numbers of the documents being withheld. Respectfully, that is what this Court should order.

C. Scope Of Discovery In The Later Cases

With respect to the Later Cases, Defendants respectfully request that the Court either: (a) stay all merits discovery, as the DOJ initially requested, without objection; or (b) enter Defendants' proposed order with the compromise language.

In the Mot. to Stay, the DOJ moved for a Stay "including certain document discovery and depositions *involving the merits*." Mot. to Stay at 1, 9-10 (emphasis added). As to the Later Cases in particular, the DOJ made clear that a stay of all document production by or depositions of Defendants, as well as any other discovery "that goes to the merits of those [Later] cases," *id.* at 9-10, was necessary to prevent "seriously compromis[ing]" various criminal prosecutions, *id.* at 1. The DOJ asserted that such discovery—particularly in the Later Cases—would "interfere with the [DOJ]'s extensive and on-going criminal investigation and prosecutions" and "would likely compromise anticipated criminal litigation." *Id.* at 5-6.

Plaintiffs did not object to the DOJ's request to stay all merits discovery with respect to the Later Cases. *See* Mot. to Stay at 2. Plaintiffs objected only to the proposed length of the merits discovery Stay—they sought an opportunity to revisit the Stay after six months, rather than the year that the DOJ proposed—a position they confirmed at the July 10, 2013 Status Conference. *See* Stat. Conf. Tr. 25-32, July 10, 2013 (ECF No. 566) [Ex. A]. Following the Status Conference, the Court ordered all parties to "work out" a possible resolution to Plaintiffs' objection to the length of the proposed Stay. *Id.* at 31-32. Having failed to timely oppose the DOJ's request for a Stay of all merits discovery in the Later Cases, Plaintiffs should not now be permitted to use the process established by the Court for discussion of the Stay's timing to introduce new objections. *See Gen. Ret. Sys. of Detroit v. Onyx Capital Advisors, LLC*, 2013 WL 2145682, at *2 (E.D. Mich. May 15, 2013) ("[i]f a party fails to respond or otherwise oppose a motion, the district court may deem the party waived opposition to the motion.") [Ex. D] (citing *Humphrey v. U.S. Att'y Gen.'s Office*, 279 F. App'x 328, 331 (6th Cir. 2008)); *Maley v. Octapharma Plasma, Inc.*, No. 12-13892, 2013 WL 3814248, at *3 (E.D. Mich. July 22, 2013) (same) [Ex. E].

More than a month after the Status Conference, Plaintiffs presented Defendants with a draft stipulation that bore little resemblance to the requested Stay of "certain document discovery and depositions *involving the merits*," as sought by the DOJ in its Motion to Stay. *See* Mot. to Stay at 1. Plaintiffs proposed that they be permitted to seek a wide range of merits discovery, with a narrow carve-out for discovery that did not *directly* "inquire into the conspiratorial conduct of any of the Defendants or co-conspirators . . . ." Defendants responded with a proposed order that paralleled the language in the DOJ's Motion to Stay, permitting "discovery,

including Rule 30(*b*)(*6*) *depositions, that does not go to the merits of the Later Cases,* to any actual or potential conspiratorial conduct, or to other contacts among competitors, and depositions of the Plaintiffs."

At the meet and confer conference on August 29, 2013, Plaintiffs, despite having not objected to the original request for a Stay of all merits discovery, contended that a Stay on merits discovery was too broad and would preclude discovery relating to issues of damages and class action issues. Over the next month, Defendants proposed reasonable compromise language on a Stay which would allow Plaintiffs to obtain damages and class action discovery, but still stay discovery on the issues the DOJ stated would interfere with its investigation.

Defendants' final proposed compromise language is as follows:

> [A]ll discovery, including the production of documents produced to the DOJ by any Defendant in the Later Cases, is stayed except discovery, including Rule 30(b)(6) depositions, *that does not inquire into or seek information relating to* the Stayed Subjects.

Proposed Order [Ex. B] at 4 (emphasis added).

Plaintiffs rejected this proposal, insisting on the following language in the Later Cases:

> [A]ll discovery, including the production of documents produced to the DOJ by any Defendant in the Later Cases, is stayed except discovery, including Rule 30(b)(6) depositions, *that does not inquire into* the Stayed Subjects.

Id. (emphasis added).

Defendants' version allows Plaintiffs to seek discovery that does not encompass documents or information implicating the DOJ's concerns, *i.e.*, the Stayed Subjects, while permitting discovery on the issues of damages and class certification legitimately sought by the Plaintiffs. By contrast, under Plaintiffs' version, Plaintiffs might argue that they are permitted to

issue discovery into the Stayed Subjects so long as they did not *directly* "inquir[e] into" the Stayed Subjects. *Id.* Thus, Plaintiffs could interfere with the DOJ investigation simply by changing the wording of their discovery requests. For example, Plaintiffs might broadly request "all emails" or "all documents relating to pricing, bids, sales or RFQs," which would sweep in emails and documents on the Stayed Subjects. Because such requests would not, on their face, directly "*inquire into*" the Stayed Subjects, Plaintiffs' proposed version would allow Plaintiffs to argue that they are permitted.

When Defendants brought this fundamental problem to Plaintiffs' attention, Plaintiffs suggested that Defendants could simply withhold from discovery responses any information that discloses any conduct concerning the Stayed Subjects. But this withholding process is not reflected in Plaintiffs' actual proposal. Moreover, as discussed below, this process is improper, as it would require Defendants to engage in additional, burdensome and likely impossibly complex review, and multiple stages of production to proactively address the concerns addressed in the Motion to Stay, by placing the burden on Defendants to identify and withhold documents discussing the Stayed Subjects.

Defendants' proposal represents a significant compromise from the originally requested Stay, which would have precluded all merits discovery during the Stay. Defendants' proposed compromise allows otherwise non-objectionable discovery into damages, class, and other issues. To accomplish the goals sought by the DOJ without undue and improper burden, the Stay must apply to discovery not only directly *inquiring into* but also discovery *seeking information or documents related to* the Stayed Subjects. This is the only viable solution that would address the issues raised by the DOJ in its Motion to Stay, without imposing immense burden on Defendants

or allowing Plaintiffs to inquire into the Stayed Subjects through broad discovery requests. In fact, Defendants' language is nearly identical to the stay entered in a case relied upon by the DOJ. Order Re Stay of Discovery at 3, *In re TFT-LCD* (*Flat Panel*) *Antitrust Litig.*, No. M:07-1827 (N.D. Cal. May 27, 2008) (ECF No. 631) [Ex. F]. Mot. to Stay at 13. That stay covered discovery "relating to" alleged conspiratorial conduct. *Id.* at 3. Unlike Defendants' version, neither Plaintiffs' proposed version of the Stay nor their additional proposed process of withholding Stayed Subject documents finds support in the case law. This is unsurprising. Plaintiffs' proposed language set forth above would simply not result in a stay of any discovery that the DOJ sought to stay; rather, it would enable Plaintiffs to easily circumvent discovery of the Stayed Subjects through broadly-worded discovery requests. Plaintiffs' continued insistence on their narrow limitation in the face of this concern suggests that they intend to do just that.

The additional process of withholding Stayed Subject documents would only cause additional problems, as it would require Defendants to isolate and selectively withhold documents related to any Stayed Subjects. This proposal would put a significant *additional* burden on Defendants that they would never be required to otherwise bear, absent the DOJ's request for a Stay. Specifically, under Plaintiffs' approach, Defendants would be required not just to review their documents for responsiveness, but to go a step further and, for each and every email, calendar entry, memo, price quote, etc., determine whether such documents (many going back several years) reference a competitor; the name of a competitor's present or former employee (which will not always be obvious); or some potential indirect evidence of actual or potential criminal conduct under investigation by the DOJ, such as why a bid price was set at the level that it was. In addition, unless the suggestion of such behavior is self-evident, Defendants

would need to conduct a mini-investigation as to each individual document to try to ascertain if it potentially relates to any conduct that is or has been under investigation by the DOJ.

This would introduce an additional and extremely time-consuming, expensive and potentially impossible step in the document production process—a process that potentially would have to be repeated thousands of times (if not more) among all Defendants given the likely volume of total documents. One example of the extreme burden of this exercise would be a years-old calendar entry of a former employee of the producing party, simply stating "Meeting with Joe G.," where "Joe G." happens to be an employee of a competitor and a potential government witness. Under Plaintiffs' proposal, Defendants' counsel would be forced to research every one of these and similar documents from present, former or even deceased employees in the first round of production. Moreover, it places Defendants at risk for making the wrong call about whether any particular document discusses a Stayed Subject.

This additional proposal by Plaintiffs would, in effect, require Defendants to undertake certain substantial discovery burdens twice. First, Plaintiffs would require normal discovery review and preparation, with the incremental obligation to segregate material that might impact the DOJ's ongoing investigation. Then, after the Stay is lifted, Plaintiffs would be able to request that all the same documents be searched again (now with no scope limitations) and many of the same witnesses deposed again (now on additional topics). Thus, under this proposal, the Stay would likely have the effect of significantly increasing the cost, duplication and inconvenience of discovery to all Defendants without accruing legitimate benefits to the Plaintiffs. Courts have rejected partial stays that cause this type of piece-meal discovery that results in duplicative discovery. *See, e.g., Trustees of the Plumbers and Pipefitters Nat'l*

Pension Fund v. Transworld Mech., Inc., 886 F. Supp. 1134, 1141 (S.D.N.Y. 1995). Had the DOJ proposed the burdensome process that Plaintiffs proposed, instead of a Stay of all merits discovery, Defendants would have objected to the Motion to Stay.

In short, far from simply imposing the modest delay in merits discovery sought by the DOJ and Defendants, Plaintiffs' proposed additional process would impose extreme and demonstrable burden on, and thus significantly prejudice, Defendants. It is not clear what legitimate benefit would be conferred on Plaintiffs by their proposal. Whatever Stay is ultimately imposed will eventually be lifted, perhaps in a short time, and Plaintiffs will obtain all appropriate discovery.

Defendants' proposal to stage certain discovery, by contrast, avoids the burden identified above and does not impose on each Defendant the risk of interfering with a criminal investigation. Defendants' proposal is also precisely the type of solution recommended in the Model Order Relating to the Discovery of Electronically Stored Information issued by the Eastern District of Michigan on September 20, 2013 (the "Model Order") [Ex. G]. Principle 1.03 of the Model Order states that "[w]here the discovery request is potentially burdensome to the responding party, the parties should consider options such as staging discovery . . . in an attempt to reduce the costs of production." Defendants' proposal accomplishes exactly what this Court suggests – it stages discovery to avoid burden.

The Stay may, at most, result in a short delay. As the DOJ pointed out in the Motion to Stay, any such delay is not recognized as sufficiently prejudicial to oppose a stay. Mot. to Stay at 22 (citing *In re Adelphia Commc'ns Secs. Litig.*, No. 02-1781, 2003 WL 22358819, at *4 (E.D. Pa. May 14, 2003) [Ex. H]). The delay resulting from the Stay proposed by the DOJ and

Defendants, which would allow discovery of non-merits issues, is likely to have little impact given the likely amount of permitted discovery from the Later and Initial Cases. Thus Plaintiffs would not be prejudiced by either Defendants' proposal or a stay of all merits discovery.

Accordingly, Defendants submit that the only fair and efficient course of proceeding is for the Court to either: (a) stay all merits discovery as initially requested, without objection, by the DOJ; or (b) enter the proposed Order with the compromise language as proposed by Defendants.

D. Post-Stay Discovery Regarding The DOJ's Investigation

Within the context of a DOJ investigation, the confidentiality of communications between the DOJ and any cooperating individuals or entities is integral to both the interests of the DOJ and such cooperating individuals or entities. For that reason, and as specifically requested by the DOJ in its Stay Motion, Defendants believe the Court should "permanently prohibit discovery of any type, in any of the civil cases, that seeks to obtain information about the Division's investigation or any grand jury investigation." Mot. to Stay at 10. Plaintiffs stated at the Hearing that they objected only to the length of the Stay, since then they have failed to file an opposition to the DOJ's Stay Motion, and they should not now be allowed to circumscribe the relief that the DOJ expressly requested.

In order for the DOJ to effectively pursue an investigation, it requires witness cooperation. *See* Scott D. Hammond, Deputy Assist. Att'y Gen., *Cracking Cartels With Leniency Programs*, (Oct. 18, 2005), *available at* http://www. justice.gov/atr/public/speeches/ 212269.htm [Ex. I] (stating that "[c]ooperation from leniency applicants has cracked more cartels than all other tools at our disposal combined," and identifying the "[p]romise of

confidentiality" as an incentive for potential leniency applicants.). These cooperating witnesses would not provide full and complete information regarding conduct under investigation if such communication was not kept confidential. *See id.*; Scott D. Hammond, Deputy Assist. Att'y Gen., *The U.S. Model of Negotiated Plea Agreements*, at 7 (Oct. 17, 2006), *available at* http://www.justice.gov/atr/public/speeches/219332.htm [Ex. J] ("Plea negotiations are generally considered confidential."); Scott D. Hammond, Deputy Assist. Att'y Gen., *Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations*, at 1 (Mar. 29, 2006), *available at* http://www.justice.gov/atr/public/speeches/215514.htm [Ex. K] (stating that "companies and their executives must be able to predict with a high degree of certainty the rewards if they self report and cooperate"). Thus, communications with the DOJ should generally not be discoverable, and should remain confidential. *See In re: TFT-LCD (Flat Panel) Antitrust Litig.*, No 07-CV-1827 (N.D. Cal., May 27, 2008) (Motion to Stay at 13 and Attachment D).

In order to ensure the confidentiality of communications with the DOJ, Defendants propose, and the DOJ agrees, that discovery inquiring into the DOJ's or any federal grand jury investigations involving conduct that is or has been under investigation by the DOJ should be permanently prohibited, with one narrow exception under which a party would be able to seek permission from the Court, subject to objection by the DOJ or any party, to ask questions at deposition. *See* Proposed Order, Ex. B, at 5. Defendants propose that after any Stay is lifted, and at minimum two weeks prior to the date noticed for a deposition, a party may request that the Court permit it to question a fact witness about statements made by that witness to the DOJ. The requirement of two weeks' notice sensibly gives any Party (or the DOJ) sufficient notice to object to such a request and sufficient opportunity for the Court to properly consider it.

Plaintiffs have rejected the DOJ's request and the Defendants' proposed language, and instead want not only the ability to question fact witnesses at deposition about statements to the DOJ, but also the ability to request that the Court allow them to obtain other discovery of a witness or corporate entity (other than the DOJ itself) with respect to statements made by any individual witness or entity to the DOJ. The DOJ has informed Defendants that if Plaintiffs were to make such a request of the Court, the DOJ would object because it adamantly opposes any discovery into its investigative process, including discovery of statements by individual witnesses and entities. Because Plaintiffs' proposal would undermine open discussions and cooperation with the DOJ, and would set precedent that would deter future cooperation between parties and the DOJ, the Court should reject Plaintiffs' proposal.

E. Multiple Depositions Of Witnesses Who Have Knowledge Of Information Falling Within The Scope Of The Stay In The Initial Cases

The DOJ seeks to prevent deponents in the Initial Cases from being required to testify during the Stay about conduct that is or has been under investigation or contacts among the Defendants and their competitors. "[M]erits depositions at this point in time would likely compromise anticipated criminal litigation." Mot. to Stay at 6. Accordingly, the DOJ requests (and Plaintiffs and Defendants agree) that there can be no questions at depositions, including Rule 30(b)(6) depositions, with respect to any Stayed Subjects during the Stay.

Staying such questioning, however, could result in duplicative depositions that put unnecessary burden on all parties. Many witnesses who would have information discoverable during the Stay, including witnesses designated to testify under Rule 30(b)(6), would also have

information prohibited from discovery by the Stay. Re-deposing such witnesses after the Stay is lifted would subject the parties and witnesses to unnecessary burden.

One solution would be for the Court to prohibit all depositions during the Stay. Alternatively, the Court should require that in the event either a Plaintiff or a Defendant goes forward during the Stay with the deposition of a witness after being notified that the witness also has information subject to the Stay, then that party must pay the attorneys' fees and expenses (including travel) associated with a second deposition of such a witness after the Stay is lifted. This would create an incentive for the parties to avoid deposing witnesses twice, which avoids unnecessary burden and streamlines discovery.

F. Effect On Cases Subsequently Filed Or Consolidated

At the DOJ's request, the proposed Order purports to bind all cases subsequently filed in or consolidated into MDL 2311. Defendants take no position on this issue.

For the foregoing reasons, Defendants respectfully request that the Court enter the Order with the alternative language proposed by Defendants.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2013, I caused the foregoing Defendants' Joint Memorandum Regarding the Motion to Stay by the United States of America to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notifications of such filings to all counsel of record.

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